



Pete Ricketts
Governor

STATE OF NEBRASKA

OFFICE OF THE GOVERNOR
P.O. Box 94848 • Lincoln, Nebraska 68509-4848
Phone: (402) 471-2244 • pete.ricketts@nebraska.gov

Governor Ricketts,

On Friday June 23, 2017 you requested that I conduct a review of Nebraska State Patrol (NSP) operations and administrative processes to identify opportunities for continuous improvement. My review is complete and my findings follow below:

Scope & Process

In the weeks preceding June 23th, our office learned of a number of anecdotal, though concerning, issues involving NSP leadership conduct, operations, policies, and procedures. These included:

- Conflicting leadership accounts of the events surrounding Trooper [REDACTED] Tactical Vehicle Intervention (TVI) initiated on Oct 3rd, 2016.
- Allegations of sexual impropriety raised by a former Trooper-candidate communicated to our office by Trooper's union lawyer Gary Young on June 22nd, 2017.
- A grievance initiated by the Trooper's union, the State Law Enforcement Bargaining Council (SLEBC), alleging that NSP failed to timely issue replacement body armor to troopers.
- A survey received from the NSP chain of command purportedly conducted by the Trooper's union with adverse responses on questions of trooper morale and trust in leadership.
- The arrest of an NSP trooper alleged to have stolen NSP ammunition.
- Findings by the State Auditor that questioned NSP fiscal stewardship on the allocation of overtime.

[Note: Other potential improprieties were identified during my review that were unknown to our office when this review commenced. Those findings are also detailed in the report.]

The review sought to determine whether the concerns raised could be substantiated and to recommend corrective measures where opportunities for improvement were identified. The scope of my review included interviews with current and former command staff officers, interviews with current and former troopers, and reviews of select operating procedures, processes, and training.

My findings are organized in three parts: 1) Colonel Rice's leadership and conduct, 2) leadership and conduct by others in the NSP chain of command leadership and conduct, and 3) deficiencies in process and procedure at NSP.

Part I. Colonel Rice's Leadership and Conduct

A. Colonel Rice directly interfered with the conduct of internal affairs (IA) investigations on at least four occasions.

- IA Case 16-014 concerned the use of lethal force in the form of a rifle-butt to the head of a passive resistor. NSP command staff characterized the force employed as "shocking to the conscience." In the command staff meeting that followed viewing video of the incident some members of the command staff believed Col. Rice downplayed its significance and was not interested in a criminal inquiry into trooper misconduct. He also initially directed that an investigation into dishonesty by the trooper involved not be pursued.
- IA Case 16-050 concerned dual investigations of use of force and in the alternative a vehicle accident report stemming from an attempted TVI maneuver. On the evening in which the incident occurred Col. Rice was attending a conference in Kearney with other senior command staff. In the hours following the incident Col. Rice conferred with Lt. Col. Schwarten and Major [REDACTED] to manage the response and investigation, coordinating with Captain [REDACTED] at the scene. That group directed Sgt. [REDACTED] to the scene to investigate, circumventing Investigative Services Captain Pelowski who was co-located with the group in Kearney and who's duty it normally would have been to assign an investigator. After the initial investigation at the scene, there was a 10 day delay in commencing an IA investigation. This delay flowed from command staff initially challenging the IA office as to whether an investigation was necessary. Those challenges were not overcome until Col. Rice was shown the video by IA staff. Upon reviewing the video with IA investigative staff, Col. Rice asked who ultimately makes the decision about whether it was an accident or a TVI. Upon being informed that the decision was his, Col. Rice remarked "well it looks like the vehicle swerved into the trooper to me." All NSP staff involved (6) are currently suspended pending investigation.
- IA Case 15-024 concerned an allegation of untruthfulness unrelated to a criminal investigation against a trooper who had a senior role in the Trooper's union. While the investigation was ongoing, Col. Rice engaged in ex parte discussions with the accused and the State Law Enforcement Bargaining Council (SLEBC) union President Sgt. Brian Peterson in an apparent attempt to resolve the issue

informally. In so doing, Col. Rice made himself a witness in the case. Col. Rice then took the unprecedented action of personally assigning the investigative officer to a case in which he himself was a witness.

- IA Case 15-018 dealt with allegations of dishonesty against a trooper who was found to have conducted a TVI without permission, for which discipline was imposed. The trooper grieved the imposition of discipline, and during the arbitration process made statements that contradicted prior statements made during the initial TVI investigation. A dishonesty charge was filed against the trooper and an IA case opened to investigate the contradictory testimony. Ultimately that investigation was not conducted because Col. Rice directed that the case be put into “abeyance” under the auspices of avoiding “interference” in ongoing civil proceedings between the parties. This decision and its rationale is communicated in a letter authored and signed by the Colonel. The trooper in question retired before the investigation was completed.

Recommendations

- 1) Colonel Rice was dismissed for his conduct in connection with these investigations.
- 2) The facts surrounding these use of force incidents and their subsequent investigations have been referred to the FBI. The Federal investigation should proceed with NSP’s full support and cooperation.

B. Col. Rice violated the Governor’s Workplace Harassment and Equal Opportunity Policies

- In February 2017, Col. Rice learned of a workplace complaint involving pre-employment medical screening that had originated in September 2014. In the intervening years, NSP failed to document the complaint, any investigative findings, or follow through with updates for the complainant. Upon learning of the allegation in February, Col. Rice had an opportunity to exhibit leadership by correcting the agency’s inaction – yet he failed to do so. No formal investigation into the allegations or follow through with the complainant occurred until they were initiated by the Governor’s office during the course of this review.

- Under Col. Rice's leadership, troopers were prohibited from reporting issues to Human Resources (HR) without first seeking to resolve the issue within their chain of command. This may have operated to deter the reporting of impropriety and the consistent application of state and NSP policy across all troop areas.

Recommendations – see below under process and procedural deficiencies related to NSP's sexual harassment policy.

C. Col. Rice violated the chain of command by engaging in an unduly familiar relationship with the SLEBC union President

- NSP is a paramilitary organization that leverages a military style rank structure and chain of command to manage operations. The effectiveness of such a structure requires the authority of subordinate commanders not be undermined by skipping levels in the chain of command. A further requirement is the maintenance of professionalism between members of senior and lower rank. NSP's Code of Conduct also places limitations on relationships "which give rise to actual or perceived conflicts of interest and/or create an adverse impact on supervision, safety, and morale."
- In June of 2015 Capt. Jahnke learned from his subordinates that Col. Rice had recently attended a SLEBC Board meeting in which he and SLEBC union President Sgt. Brian Peterson jointly announced that a command staff reorganization was set to occur that would begin with IA commander Kevin Ryan and ultimately involve each of the Majors. The reorganization was said to have been initiated at Peterson's direction.
- On June 16th, of 2015, Col. Rice launched a re-organization of command staff that was to be effective at 0000 hours the following morning. The announced reassignments were consistent with the statements of Capt. Jahnke's subordinates including the reassignment of IA commander Kevin Ryan. This resulted in a vacancy in the IA commander role. On June 24th, Col. Rice asked the agency legal counsel if Sgt. Peterson, as the head of SLEBC, should have a role in selecting the next IA commander. Legal counsel advised against it, characterizing such a role for union leadership as a conflict of interest. There is no evidence the Union was ultimately involved in the selection of Lt. Ryan's successor.
- In the spring and summer months of 2015, Col. Rice and Sgt. Peterson had joint meetings with local troopers and sergeants in each Troop area. Despite

objections from senior officers, command staff and local commanders were prohibited from attending. During the course of these meetings, Col. Rice is reported to have informed troopers that he didn't care about traffic enforcement, thereby potentially undermining troop area commanders who's duty it is to direct their commands in the enforcement of the State's traffic laws.

- Thereafter Col. Rice had monthly breakfast and lunch meetings with Sgt. Peterson. During these meetings Sgt. Peterson gave union complaints directly to Col. Rice who brought them back to command staff to remedy in apparent violation of the SLEBC labor contract's grievance procedures and at odds with our office's expectations that complicated labor issues are resolved in consultation with the Division of Employee Relations.
- Collectively these actions by Col. Rice to cultivate a personal relationship with Sgt. Peterson beyond the typical Colonel/Sergeant relationship undermined the chain of command by giving rise to the appearance that union leadership was driving operational and disciplinary decision making.

Recommendations

- 1) NSP Leadership should reinforce the importance of the chain of command in operational decision making.
- 2) The NSP Code of Conduct provides no general guidance on how the chain of command should operate with regard to senior/subordinate relationships generally. The NSP Code of Conduct should be revised to address this shortcomings.
- 3) The NSP chain of command should not be involved in union negotiations of employee relations issues. All union concerns and grievances should be referred to the Department of Administrative Services and the State's Employee Relations Director, Bill Wood.

Part II. Chain of Command Leadership and Conduct

A. During two use of force investigations the NSP Chain of Command engaged in conduct that gives rise to a reasonable suspicion of dishonesty and/or dereliction of duty.

- The use of force report following the application of lethal force with the rifle-butt blow characterized the incident as involving "a small amount of force." That

report was originated by the trooper who used the force and was signed by Sgt. [REDACTED] and LT [REDACTED], both of whom knew or should have known this was a misrepresentation. Further, LT [REDACTED] sent an email to the IA investigator also stating that "a small amount of force" was used but that the suspect was uninjured. LT [REDACTED] would have had an opportunity to view the video of the incident and also knew or should have known the suspect was treated for his injuries at the hospital.

- The events surrounding the creation of "dual narratives" following the TVI use of force are well documented in the media. The trooper who engaged in the TVI requested permission to perform it, reported commencing it, and reported having conducted it. Shortly after the incident he had a conversation with an unidentified 3rd party over the phone with whom he reports having conducted a TVI according to policy. The video evidence from the incident shows "a textbook TVI," according to NSP investigators who saw it.
- A competing version of events that characterized the contact as an accidental result of the suspect's vehicle initiating the contact emerged in the hours following the incident. This occurred contemporaneous with the conference in Kearney between Col. Rice, Lt. Col. Schwarten, Maj. [REDACTED], and Capt. [REDACTED] described above. As discussed above, Capt. Pelowski was excluded in assigning an investigator despite the fact that he was co-located with the group, and instead command staff hand selected Sgt. [REDACTED] to conduct the investigation.
- Former IA commander Dennis Leonard speculated that Sgt. [REDACTED] was selected because command staff believed his objectivity would be compromised by his personal rapport with Capt. [REDACTED] and Maj. [REDACTED].
- Leonard further states that when Sgt. [REDACTED] was asked how his investigation concluded the incident was a unit accident rather than a TVI, [REDACTED] responded, "That's what he [REDACTED] told me." This raised concerns with Leonard that the investigation at the scene was not sufficiently rigorous.
- Attempts to sustain the accident narrative at odds with the video evidence included the submission of an improper 801 investigative form by Capt. [REDACTED], the refusal of Maj. [REDACTED] to watch the video in question (potentially a dereliction of his duty as the operational commander of traffic services), Maj. [REDACTED] accusing the IA investigator of insubordination for

challenging the accident narrative, and may have culminated with misrepresentations to the grand jury.

- The use of force report for the TVI incident is signed by the same two officers that signed the rifle-butt strike use of force report.

Recommendations

- 1) Officers with questionable actions in these incidents have been placed on administrative leave pending investigation. Those investigations are proceeding. If it is determined that state law or NSP policy was violated, discipline will be imposed.
- 2) At our office's direction, all IA investigations during Col. Rice's tenure have been reviewed and flagged if similar patterns of undue command influence or discrepancies in reporting are identified. Two of these investigations are recommended to be re-opened, neither of which involved acts of dishonesty related to the underlying criminal cases.

B. NSP has consistently failed to notify the Crime Commission when officers are terminated for wrongful conduct or resign in lieu of accepting discipline for wrongful conduct.

- The officer involved in the rifle-butt incident resigned voluntarily in advance of his final disciplinary hearing with Col. Rice. The fact that the officer's termination was voluntary does not abrogate NSP's affirmative duty to report to the Crime Commission the circumstances of his termination and the founded allegations against him. Failure to do so means that the officer retains his law enforcement certification and may be able to obtain a law enforcement job in another jurisdiction.
- NSP has a practice of administratively closing misconduct investigations if the officer resigns before the investigation is complete. The failure to complete these investigations and report the findings to the Crime Commission may result in officers who have resigned under suspicion of wrongdoing finding employment as law enforcement officers in other jurisdictions.

- NSP administration has identified 12 total cases over the past ten years that should have resulted in a certification review but for NSP's failure to notify the Crime Commission of the officer misconduct.

Recommendations

- 1) NSP has identified 12 cases of misconduct going back to 2008 in which it failed to refer the matter to the Crime Commission for review. This has now been completed.
- 2) NSP should make it standard operating procedure to notify the Crime Commission when founded allegations of officer impropriety occur that would jeopardize an officer's standing with the Police Standards Advisory Council (PSAC).
- 3) If an officer resigns before an investigation into impropriety is finalized, NSP should make it standard operating procedure to complete the investigation anyway. Public policy dictates that the Crime Commission should know the facts of any serious officer impropriety.

Part III. Deficiencies in Process and Procedure

A. Nebraska State Law, SLEBC Contract Provisions, and NSP Organizational Policy operate to undermine accountability.

- Under the SLEBC labor contract NSP may be barred from releasing IA files or investigative outcomes to third parties unless the files are subpoenaed. Once a subpoena is issued NSP must give the employee notice and refuse to comply until after the employee has been afforded an opportunity to avail him or herself of all available legal remedies to prevent their release. The inability of NSP to release IA information is at odds with public policy by 1) preventing transparency with the public in cases of officer misconduct, 2) denying to NSP the opportunity to use video evidence from incidents for training purposes, 3) potentially enabling officers with founded allegations of misconduct to pursue employment with other agencies (see next bullet).
- Under Nebraska state law, the Executive Director of the Crime Commission lacks administrative subpoena power to overcome the SLEBC contract and compel release of IA files for certification determinations. While the Police Standards

Advisory Council does have subpoena power, the PSAC's function is not investigative, and it acts on the referrals and recommendations of the Executive Director of the Crime Commission. The Director's lack of subpoena power, combined with NSP's contractual inability to release IA files, operate together to severely limit the ability of the State to prevent officers guilty of misconduct from obtaining employment with other law enforcement agencies.

- SLEBC has an affirmative duty to defend its members when they are accused of wrongdoing. Most NSP IA cases are investigated by Sergeants. Sergeants are the lone group of supervisors permitted under the State Collective Bargaining Act (SCBA) to fall within the law enforcement bargaining unit rather than the Supervisor's unit. The Sergeant's status as both investigative officers and members of the union obligated to defend the troopers they are investigating creates an inherent conflict of interest that may have been a contributing factor in the suspected malfeasance in the use of force investigations discussed above.
- As evidence of this conflict of interest, SLEBC union President Sgt. Peterson stated in a meeting with Chief of Staff Matt Miltenberger and Chief HR Officer Jason Jackson on August 1st, 2017 that Trooper Bixby did nothing wrong when he employed his rifle-butt strike to the head.
- Except in cases of felonious or dishonest conduct, the SLEBC contract affords members accused of impropriety the opportunity to review all evidence against them before they are interviewed by an investigating officer. This contractual provision could potentially enable an officer suspected of wrongdoing to escape culpability by framing their own testimony to comport with the evidence they know to be in the possession of the investigating officer.
- The Nebraska Attorney General's (AG) office may be barred from investigating or prosecuting wrongdoing by NSP troopers by state law that obligates the AG's office to provide legal defense to NSP troopers facing criminal or civil liability. This creates an ethical conflict for the AG's office that can only be overcome by recusing their office from any potential criminal investigation into state patrol members.

Recommendations:

- 1) The Governor's Chief Negotiator should immediately seek to work with SLEBC representatives to remove provisions governing internal investigations

from the SLEBC contract. It is in both parties' interests to instill in the public confidence that State Patrol's conduct is above reproach.

- 2) If negotiations with SLEBC fail, statutory remedies should be pursued to eliminate the internal affairs investigative process from the sphere of collective bargaining.
- 3) Statutory revisions should be pursued to 1) vest the Executive Director of the Crime Commission with authority to obtain officer misconduct reports from NSP, and 2) NSP to report terminations resulting from dishonesty or misuse of force to the Crime Commission.
- 4) The SCBA should be reformed to bring State Patrol into alignment with all other agencies of state government by removing Sergeants from the law enforcement bargaining unit and placing them in the supervisory bargaining unit so as to avoid the conflict of interest that arises when members of the union obligated to defend officers accused of impropriety are also investigating the impropriety.
- 5) Statutory provisions such as 81-2009 that operate to potentially prevent the Attorney General from exercising any investigatory or prosecutorial power over the State Patrol should be repealed or revised.

B. NSP's IA procedures should be reviewed

- NSP policy outlines a "continuum of force" ranging from officer presence and verbal commands up to lethal force. Officers are trained to employ the minimum necessary force to overcome the level of resistance being demonstrated by suspects to compel compliance.
- When force is employed by a trooper, an "803" form is filed by the trooper involved which details the resistance encountered and the force employed. This process is administrative, not investigative. It is not standard operating procedure for the use of force itself to be investigated for consistency with policy within the continuum of force.
- It is standard NSP practice for the individual assigned to conduct an internal affairs investigation to also make the final determination of whether the allegation is "founded" or "unfounded." This process is at odds with basic criminal justice principles that distinguish the role of the investigator from the

“trier of fact” and places an undue burden on the investigative officer for the adjudication of the issue.

- Lieutenants and above are classified rules covered employees. Investigations into misconduct by these high ranking officers are unnecessarily conducted according to the process prescribed by the SLEBC labor agreement. This is at odds with the State’s personnel rules which are supposed to supersede agency policy.

Recommendations

- 1) NSP should make it standard operating procedure to thoroughly investigate any use of force for consistency with the law and NSP policy.
- 2) To avoid vesting in the same officer the responsibility to both investigate and adjudicate IA cases NSP should evaluate best practices in other law enforcement organizations for the proper roles and organization of IA staff.
- 3) NSP should revise its process for adjudicating impropriety involving officers in supervisory positions to comport with the State’s personnel rules.

C. NSP’s Sexual Harassment and Workplace Discrimination Policies are insufficient

- NSP’s sexual harassment policy and command training are insufficient to address allegations of sexual impropriety. In one particular case (discussed above), this insufficiency contributed directly to the failure on the part of leadership to properly document investigative findings and follow up with a complainant for approximately 28 months from the original allegations she lodged with her chain of command. The source of the complaint – alleged impropriety by a third party agent of NSP – is not directly addressed by NSP’s sexual harassment policy. Leadership nonetheless should have exercised more independent judgment to investigate and document the issue at the time it was reported.
- NSP’s policy for adjudicating sexual harassment allegations gives complainants the option of pursuing “informal resolution” with the accused or a formal investigation through the IA process. Both paths to resolution may be subject to the same bias and confidentiality provisions discussed above which may undermine the confidence of victims that their allegations will be fairly adjudicated.

Recommendations

- 1) NSP's sexual harassment and workplace discrimination policies should be revised to address non-sworn and third party agent conduct. The policy should also be revised to enhance the clarity and expectations for leaders throughout the organization on the duties and judgment they are expected to exhibit. Overall, NSP policy needs to be corrected to shift the burden from the victim, and training needs to occur for leaders to know when the policy is implicated by conduct reported or observed.
- 2) All NSP leaders, sworn and unsworn, should immediately participate in sexual harassment and equal opportunity training. That training should emphasize the necessity for discernment on the part of leaders to be attentive to issues that may implicate the sexual harassment, workplace harassment, and equal opportunity policies.
- 3) The command practice of discouraging reporting to HR should be immediately discontinued for allegations of impropriety.
- 4) Sexual harassment allegations should be adjudicated independent of the IA process to ensure their fairness and transparency. If necessary, contractual and/or statutory relief should be pursued to enable a revision to this process.
- 5) NSP should investigate and pilot other initiatives that address sexual harassment specifically and create a more inclusive work environment generally.

D. NSP has failed to exercise proper fiscal stewardship of overtime spending.

- The State Auditor noted in his report issued June 30, 2017, that for the period from July 1 '15 to Dec 31 '16, NSP spent more than \$3M on overtime (OT) excluding federal grant-funded overtime. NSP administration's management of OT spend at the troop area level is limited to annual reviews during Phase II meetings. There is no process or expectation that officers receive approval from the chain of command before incurring overtime despite a contractual obligation that officers do so.
- Troopers earn holiday compensatory (comp) time when they work on a holiday. The SLEBC contract allows troopers to accumulate 240 hours of holiday comp

time before the agency can compel troopers to use their holiday comp time off. Under the contract, management retains the operational discretion to schedule a trooper to work a holiday, and may compel troopers who have earned more than 240 hours of holiday comp time to take holiday comp time off. Despite this discretion available to him, Colonel Rice allowed troopers the option to work holidays whether there was an operational need or not. As a consequence, NSP has accumulated approximately \$1.45M in holiday comp time liability. In addition, a liability exists for \$1.09M in regular compensatory time banks that officers are permitted to accumulate up to 120 hours.

- An Allegation has been made by a former trooper that the Troop E chain of command may have been engaged in an effort to defraud the federal government by deliberately miscoding overtime spending against High Density Drug Trafficking Area (HIDTA) grants.

Recommendations

- 1) Scheduled overtime should only be granted with documented approval from a supervisor, per the SLEBC contract.
- 2) NSP Administration should document and track the use of scheduled OT and unplanned OT.
- 3) NSP Administration should consider assigning budget management responsibilities to local commanders for resource management within their sphere of operational control, and place hard caps on OT budgets per troop area based on operational needs
- 4) Local commanders should be afforded the discretion to schedule holiday and overtime work to meet their operational commitments within budget.
- 5) NSP should immediately take steps to ensure no additional comp time liability is incurred and liabilities that do exist are paid down via any available legal and contractual remedies.
- 6) NSP overtime spending coded against the HIDTA grant is currently under review by an independent auditor and is being investigated internally for violations of NSP policy. HIDTA overtime reimbursements for OT incurred by Troop E during the administration of Colonel Rice are being withheld by the federal government pending the outcome of the investigation. These reviews should continue

expeditiously and if the findings give rise to suspicion of criminal wrongdoing, they should be shared with the FBI as part of the ongoing criminal inquiry.

E. **NSP lacks sufficient internal controls over range ammunition**

- As the Auditor identified in his report, NSP's process for ammunition distribution is for range safety officers [RSO's] to provide to requesting troopers the amount of ammunition they request. After the distribution of the ammunition, RSO's don't typically verify the amount of ammunition expended or used by the officer. This creates a risk that issued yet unexpended ammunition may be lost, stolen, or misused. This risk seems to have been realized with the recent arrest of a NSP trooper under suspicion of having stolen more than \$5,000 in NSP ammunition.

Recommendation – NSP should review ammo handling and control practices from other law enforcement agencies and the Nebraska Military Department and apply the best practices in the development of its own policy.

F. **NSP lacked an adequate process for the timely distribution of protective vests to troopers.**

- The SLEBC contract obligates NSP to replace all body armor before the manufacturer's date of expiration. Historically, NSP and SLEBC have treated the manufacturer's 5-year warranty as the expiration. NSP's past practice has been to procure and distribute new vests in the current year to those troopers that had received their vests five years ago. Thus, though troopers receive their new vests within the anniversary year of the prior issuance, they nonetheless may have already exceeded the manufacturer's warranty.

Recommendation - Going forward NSP will order new vests and distribute them in the fall preceding the year of their warranty expiration.

Conclusion

This review has substantiated concerns related to the former Superintendent and officers who have been placed on administrative leave, identified underlying legal and policy impediments to accountability, and substantiated concerns related to the adequacy of NSP policies and operational procedures. This review has also identified corrective measures currently in process and others recommended that our office expects the interim administration and next Superintendent to implement.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JJ' with a long horizontal stroke extending to the right.

Jason Jackson

Chief HR Officer